LIBRARY
SUPREME COURT U.S.

Office-Supreme Court, U.S.
FILED
MAY 4 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 995

THE STATE OF WASHINGTON, *Appellee*,

v.

HI-LO FOODS, INC., *a Washington Corporation*;

TACOMA ASSOCIATION OF CREDIT MEN, *a Washington Corporation*, *Appellant*,

and

JACK FROST COMPANY, INC., *a Washington Corporation*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

JOHN J. O'CONNELL,
Attorney General of the State of Washington,
Temple of Justice, Olympia, Washington,

JAMES A. FURBER,
Assistant Attorney General,
Temple of Justice, Olympia, Washington,

HENRY W. WAGER,
Assistant Attorney General,
Temple of Justice, Olympia, Washington,

Attorneys for Appellee.

STATE PRINTING PLANT, OLYMPIA, WASH.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 995

THE STATE OF WASHINGTON, *Appellee*,

v.

HI-LO FOODS, INC., *a Washington Corporation*;

TACOMA ASSOCIATION OF CREDIT MEN, *a Washington Corporation*, *Appellant*,

and

JACK FROST COMPANY, INC., *a Washington Corporation*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

JOHN J. O'CONNELL,
Attorney General of the State of Washington,
Temple of Justice, Olympia, Washington,

JAMES A. FURBER,
Assistant Attorney General,
Temple of Justice, Olympia, Washington,

HENRY W. WAGER,
Assistant Attorney General,
Temple of Justice, Olympia, Washington,

Attorneys for Appellee.

INDEX

	Page
QUESTION PRESENTED	6
COUNTERSTATEMENT OF THE CASE	6
THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	8
QUESTIONS 2 AND 3 POSED BY APPELLANT WERE NOT PROPERLY RAISED OR EXPRESSLY PASSED ON BY STATE COURT	9
CONCLUSION	11

TABLE OF CASES

Cissna v. Tennessee, 246 U.S. 289, 38 S. Ct. 306, 62 L. ed. 720 (1918)	10
Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, 35 L. ed 1004 (1891)	10
A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S. Ct. 599, 78 L. ed. 1109 (1934)	9
Parker v. McLain, 237 U.S. 469, 35 S. Ct. 632, 59 L. ed. 1051 (1915)	9
Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 53 S. Ct. 32, 77 L. ed. 180 (1932)	9
State Bd. of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527, 51 S. Ct. 540, 75 L. ed. 1248 (1931)	9
Utley v. St. Petersburg, 292 U.S. 106, 54 S. Ct. 593, 78 L. ed. 1155 (1934), rehearing denied 292 U.S. 604, 54 S. Ct. 712, 78 L. ed. 1466	9
Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. ed. 194 (1922)	9

REVISED CODE OF WASHINGTON

82.05.050	7
82.32.220	6, 7

FEDERAL CONSTITUTION

§ 1, Fourteenth Amendment	6, 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 995

THE STATE OF WASHINGTON, *Appellee*,

v.

HI-LO FOODS, INC., *a Washington Corporation*;

TACOMA ASSOCIATION OF CREDIT MEN, *a Washington Corporation*, *Appellant*,

and

JACK FROST COMPANY, INC., *a Washington Corporation*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the appellee respectfully moves that this court enter an order dismissing the appeal on the grounds that this case does not present a substantial federal question, and that the second and third questions sought to be reviewed were not properly raised or expressly passed on by the state court.

QUESTION PRESENTED

Does Revised Code of Washington 82.32.220 (Appendix B, Juris. St.) deprive appellant of equal protection of the law guaranteed by section 1 of the Fourteenth Amendment to the Federal Constitution because it makes the state's lien for business and occupation taxes and retail sales taxes superior to the antecedent lien of persons having a beneficial interest in the business incurring the taxes, while the state's lien is subordinate to prior liens of persons having no beneficial interest in such business?

The foregoing is the only possible question presented by this appeal. Appellant has over simplified question one. Questions two and three posed by appellant were not raised in the state court and were not expressly passed on by that court.

COUNTERSTATEMENT OF THE CASE

Hi-Lo Foods, Inc., a corporation, was operating a grocery store business. Through its predecessors, on May 18, 1956, it gave to the appellant as mortgagee and trustee for previously unsecured creditors, its mortgage on all property owned by it or to be thereafter acquired. Included was all after acquired property, shifting stocks of merchandise and all fixtures and equipment.

The mortgage permitted Hi-Lo Foods to continue in business with all payments received thereunder being first applied to the costs of administering

the trust, including ten per cent to the trustee, with the balance distributed to the creditors for whose benefit the mortgage was executed.

Among the conditions contained in the mortgage were the following: (Appendix A, Juris. St.)

1. The mortgagee had the right to select, at its option, the manager, auditor, bookkeeper, clerk or cashier of the mortgagor.

2. In case of default in the mortgage payments, abandonment of the business by the mortgagor, the mortgagee feeling insecure, or the mortgagor permitting any taxes to become delinquent, the mortgagor could take possession.

Hi-Lo Foods continued in business until it became hopelessly insolvent. During this period of operation and subsequent to the date of the mortgage Hi-Lo Foods incurred liability to the appellee for unpaid business and occupation taxes and for failure to remit retail sales taxes collected from customers and held in trust by Hi-Lo Foods for appellee under RCW 82.05.050.

The appellee instituted this action in the Superior Court of the State of Washington for Pierce County for the appointment of a receiver and to enforce its lien under RCW 82.32.220. Not only the first proviso of that statute is important. Particular consideration should be given to the entire statute with emphasis on the proviso and the sentence preceding it. (Juris. St. 3).

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Supreme Court of Washington based its decision upon the reasonableness of classifying creditors in appellant's position from other types of creditors (Appendix A, Juris. St.) for purposes of determining the status of the state's tax lien.

In its opinion the Washington court stated:

> "A clear, sharp line marks the difference in the case at bar between creditors having a prior recorded mortgage or lien upon a specific object and creditors having a general lien upon a shifting stock of goods, payment of which depends upon the continued operation of a business. Creditors who must look to the continued operation of a business, the carrying on of which requires the collection of tax moneys for the state and the incurring of further tax liability, occupy a status so markedly different from that of chattel mortgagees that the reasonableness of such classification is apparent."

The state court's decision was based upon the obvious differences between creditors who have a lien but depend upon the operation of a business for payment in full of their claims and creditors who have no interest in the business other than a lien upon specific property. The basis of difference was not, as appellant contends, upon the use of a trustee as security holder for previously unsecured creditors on the one hand and security directly to the creditors on the other without the use of a trustee. A federal question which rests upon an obviously false assump-

tion is so plainly devoid of merit as to afford no basis for the exercise of this court's appellate jurisdiction over a state court. *Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. ed. 1051 (1915).

Beyond any legitimate controversy, the true mark of difference which is the basis of the classification in this case does not deprive appellant of equal protection of the law under the many decisions of this court setting forth the tests for reasonableness of classification in tax cases. *State Bd. of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540, 75 L. ed. 1248 (1931); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S. Ct. 599, 78 L. ed. 1109 (1934).

No substantial federal question forming a basis for review of a decision of a state court is presented by a contention of invasion of a constitutional right, where the question has been settled by previous decisions of this court. *Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24, 67 L. ed. 194 (1922); *Seaboard Air Line R. Co. v. Watson*, 287 U.S. 86, 53 S. Ct. 32, 77 L. ed. 180 (1932); *Utley v. St. Petersburg*, 292 U.S. 106, 54 S. Ct. 593, 78 L. ed. 1155 (1934), rehearing denied 292 U.S. 604, 54 S. Ct. 712, 78 L. ed. 1466.

QUESTIONS 2 AND 3 POSED BY APPELLANT WERE NOT PROPERLY RAISED OR EXPRESSLY PASSED ON BY STATE COURT

The only question presented in the state court was whether the state statute in question discriminated against appellant and those in its class so as

to be a deprivation of equal protection under the Fourteenth Amendment to the Federal Constitution. The question of whether a state has the power to fix priority of its tax liens without being limited by the Fourteenth Amendment was not argued. Nor was such question expressly decided by the state court. (Appendix A, Juris. St.).

Any adjudication of the second and third questions posed by appellant was not necessary to the disposition of this case by the state court and any determination of them would have been superfluous. The answer to the first question completely decided the case. This court will therefore not review these questions. *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 35 L. ed. 1004 (1891); *Cissna v. Tennessee*, 246 U.S. 289, 38 S. Ct. 306, 62 L. ed. 720 (1918).

CONCLUSION

On the basis of the unanimous decision of the state court and prior opinions of this court on classification under Amendment Fourteen, no substantial federal question requiring further argument or one of any public importance is involved. A review of questions two and three is unwarranted because not properly raised in the courts below, they were not decided and decision thereon would have been superfluous.

This appeal should be dismissed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General of the State of Washington,
Temple of Justice, Olympia, Washington,

JAMES A. FURBER,
Assistant Attorney General,
Temple of Justice, Olympia, Washington,

HENRY W. WAGER,
Assistant Attorney General,
Temple of Justice, Olympia, Washington,

Attorneys for Appellee.